APPENDIX 1

COLUMBIA RIVER FISH SANCTUARY

AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided*, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation,

upon the concurrent order of the Director of Fisheries and Director of Game.

SEC. 2. It shall be the duty of the Director of Fisheries and the Director of Game, to acquire and abate any dam or other obstruction, or to acquire any water-right which may have become vested on any streams or rivers tributary to the Columbia River downstream from McNary Dam which may be in conflict with the provisions of section 1 herein. Any condemnation action necessary under the provisions of this act shall be instituted under the provisions of chapter 120, Laws of 1947, and in the manner provided for the acquisition of property for public use of the state.

SEC. 3. The provisions of this act shall not apply to the waters of the North Fork of the Lewis River, nor the White Salmon River (Big White Salmon River).

SEC. 4. This act is necessary for the immediate support of the government of the State of Washington and its existing public institutions, and shall take effect April 1, 1949.

Passed the Senate February 9, 1949.

Passed the House February 8, 1949.

Approved by the Governor February 14, 1949.

(Chapter 9, Laws of 1949; RCW 75.20.010.)

APPENDIX 2

FISHERIES CODE

AN ACT establishing a Fisheries Code for the preservation, protection, perpetuation and management of food fish and shellfish; providing for and creating a Department of Fisheries; regulating the taking and possession of food fish and shellfish; licensing appliances therefor; providing for license fees and charges; licensing all phases of the fishing industry; providing for the acquisition of land and rights in land; providing for the construction, maintenance and operation of fish hatcheries, rearing stations, laboratories, nurseries and other installations; providing for the appointment of a Director of Fisheries and designating his authority; providing for the propagation, protection and disposition of oyster beds in the State of Washington; regulating the entire food fish and shellfish industry of the state and offshore waters; repealing certain statutes; fixing penalties for the violation of this act, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

* * *

SEC. 46. It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic

permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

* * *

SEC. 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first pro-

viding plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications.

* * *

Passed the Senate March 10, 1949.
Passed the House March 10, 1949.
Approved by the Governor March 16, 1949.

(Secs. 46 and 49, Chapter 112, Laws of 1949; RCW 75.20.050 and 75.20.100.)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 514

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; AND WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., A CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION AND CITY OF TACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND CITY OF TACOMA IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. X 4397-4413) [1] is reported at 207 F. 2d 391. The opinion and order of the Federal Power Commission (R. II 522-561) is reported at 92 PUR (N. S.) 79.

[1] The roman numeral following the "R." in the references to the record indicates the volume of the printed transcript.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1953 (R. X 4414). The petition for a writ of certiorari was filed on December 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

1. Whether the Federal Power Act requires an applicant for a license for a hydroelectric project to comply with various State laws designed to conserve fishery resources in the river involved.

2. Whether the Commission properly concluded that the hydroelectric development on the Cowlitz River, as proposed by the City of Tacoma and modified in the license granted by the Commission, is best adapted to a comprehensive plan of development in light of a potential loss of fishery resources.

STATUTES INVOLVED

1. The pertinent provisions of the Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U. S. C. 791a *et seq.*) are set out in Appendix A, *infra,* pp. 21-23.

2. The pertinent provisions of the Columbia River Fish Sanctuary Act (Chapter 9, State of Washington Laws of 1949, Revised Code of Washington 75.20.010) and of the Washington Fisheries Code (Chapter 112, State of Washington Laws of 1949, Revised Code of Washington 75.20.050, 75.20.100) are set out in Appendix B, *infra,* pp. 23-27.

STATEMENT

On December 28, 1948, the City of Tacoma, a municipal corporation in the State of Washington (R. II 551), applied to the Federal Power Commission for a license under Section 4(e) of the Federal Power Act, App. A, *infra* p. 21, to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River, in Washington[2] (R. II 537-538). The proposed project, with an initial installation of 345,000 kilowatts,[3] was to consist of two developments: (1) the Mossyrock development, to be located about 65 miles upstream from the mouth of the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a power house with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity (R. II 539, 553-554; IX 4104-4106); (2) the Mayfield development, to be located about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending

[2] The Commission had earlier determined that the proposed project would affect lands of the United States, the navigable capacity of the Cowlitz River, and the interests of interstate and foreign commerce, and so under Section 23(b) of the Federal Power Act (App. A, *infra*, pp. 22-23) it could not be undertaken without the license (R. II 538-539).

[3] The City has an application pending before the Commission to install a fourth unit in each plant initially instead of at a later time, thereby increasing the initial installation to 460,000 kilowatts.

up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity (R. II 539, 554; IX 4106-4107). In the initial installation, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours.To protect the anadromous fish which use the River extensively for spawning,[4] the applicant also proposed a fish ladder system, or trapping and hauling facilities, or both methods, if necessary, to pass the fish upstream; a system of passageways and chambers to pass the adult fish and the fingerlings downstream; and the construction and operation of extensive fish hatchery facilities for artificial propagation of fish and development of fingerlings capable of making the migration to sea (R. II 532-535).

Petitioners (a private corporation and two agencies of the State of Washington) intervened in the proceedings held by the Commission to determine whether a license should issue.[5] They opposed the

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[4] Anadromous fish are fish which go up rivers for the purpose of spawning and propagation. The Cowlitz River is used for spawning by spring chinook salmon, fall chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt. The gross annual value of the salmon has been about $2,000,000, one half of which is attributable to the areas below the Mayfield dam and one half above Mayfield (R. II 549). The trout are not fished commercially and the smelt whose annual commercial value has been as high as $300,000, spawn in the main river below Mayfield.

[5] That there was no unanimity within the State as to the licensing of the Cowlitz Project is indicated by the fact that the Attorney General of the State appointed a special Assistant

granting of a license on the grounds (1) that the proposed project violated laws of the State of Washington;[6] (2) it would not be best adapted to the comprehensive development of the Cowlitz River in that the fish conservation facilities and the protective measures proposed by the City would not be effective, the project would jeopardize or destroy the valuable fishery resources of the River, and the project would conflict with a comprehensive plan for the Columbia River Basin, including the Lower Columbia River Fishery Plan.[7]

Attorney General to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus the State of Washington by its Attorney General and the people of Washington holding views opposed to the State's departmental position were represented at the hearings before the Federal Power Commission.

[6] Specifically petitioners contended that the City had failed to comply with statutes of the State of Washington, enacted after the filing of the application, in that:

1. Both of the proposed dams would exceed the 25-foot height limitation imposed by the Columbia River Fish Sanctuary Act (Ch. 9, State of Washington Laws of 1949, App. B, *infra*, pp. 23-24) on the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from McNary Dam and within the migratory range of anadromous fish.
2. The City had not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112 Section 46, State of Washington Laws of 1949, App. B, *infra*, pp. 24-25.
3. Tacoma had not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams, as required by Ch. 112, Section 49, State of Washington Laws of 1949, App. B, *infra*, pp. 25-27.

[7] The Plan, in addition to proposing to improve fish runs on the Columbia River by the removal of obstructions to the passage of fish, by the abatement of pollution, and by other means, recommended utilizing the Cowlitz River as a spawning

Following extensive hearings, a recommended decision by the Presiding Examiner proposed denial of the license (R. I 170-1; X 4399-4400). Exceptions were filed to the recommended decision (R. I. 225-456) and, after oral argument thereon, the Commission, on November 28, 1951, filed its opinion, findings of fact and order granting the license with special conditions directed at minimizing the loss of fish life (R. II 522-561).

In its order, the Commission found that the project would provide substantial flood control benefits by reducing the flood of record (should it re-occur) from 140,000 cfs at Castle Rock, Washington to 70,000 cfs (bank full capacity) (R. II 540, 546); that it would provide direct and increasingly useful navigation benefits by increasing by at least six inches the navigable depths over the River's shoals (R. II 540, 546); and that since the proposed reservoirs will be easily accessible by a state highway, they would offer substantial recreational opportunities to people from local and distant areas (R. II 540).

In addition, the Commission found that the project would assist greatly in alleviating the acute

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area for fish (R. II 527). It was prepared by the Fish and Wildlife Service of the Department of the Interior in cooperation with fish and game agencies of the States of Washington, Oregon and Idaho (R. II 527, X 4399, fn. 3). It was submitted to the Congress by the Army Corps of Engineers in its 1948 *Review Report on Columbia River and Tributaries* (H. Doc. No. 531, 81st Cong., 2d Sess.) (R. II 527.) Congress has not approved or adopted the overall plan but has appropriated funds for certain of the developments included therein (R. II 527).

power shortage in the Northwest Region, which it estimated, would continue for almost a decade (R. II 543-544), that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 per cent to the present capacity of Tacoma's generating plants and nearly ten per cent to the combined total installation in the Pacific Northwest power pool), location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle and Portland)[8] and the characteristics of its power output (the diversity of stream flow, caused by the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest Power Pool) (R. II 542-545). The Commission also found that none of the projects suggested for construction in lieu of the Cowlitz Project, could be constructed as quickly or as economically as this project (R. II 545).

As to the effect of the project on the fish life, the Commission found that although there were several problems in connection with the fish ladder system requiring biological and engineering study before adoption of a final design, the present data were sufficiently promising to warrant not rejecting the ladder system and that the alternative method of trapping and hauling upstream migrants past the

[8] The Cowlitz power would displace power now flowing from the eastern portion of the Bonneville system with resulting reduction in transmission line losses (R. II 544-545).

dams should produce reasonably satisfactory results (R. II 548); and that while it was not clear whether certain features of the proposed facilities for passing downstream migrants would be adequate to prevent excessive losses, it should be possible with proper testing and experimentation to provide facilities which would prevent undue losses (R. II 548-549).[9]

Finally, the Commission found that based on a two percent interest rate the annual value of the Cowlitz power would exceed its annual cost of production by at least $1,700,000 (R. II 546). On the other hand, since the construction of the project would not have any substantial adverse effect on the fishery resources below the Mayfield site and might even improve it, the fish life loss would be limited to that above Mayfield, and even if none of these fish were saved by the project's protective facilities, this annual net loss of about $600,000 plus the $610,000 annual cost of the protective facilities, would result in overall annual net benefits of about $500,000 exclusive of those from navigation and flood control (R. II 549-551). Based on these considerations, the Commission found that the project was

[9] As special conditions of the license, the Commission required that additional studies, test and experiments as to the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed (R. II 559-560).

best adapted to a comprehensive plan for development of the Cowlitz River (R. II 552).

In its opinion, the Commission refused to require the applicant to comply with the provisions of the Washington statutes, since "a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit" (R. II 526). As to the Lower Columbia River Fishery Plan, the Commission noted that not only had Congress not adopted or approved the overall plan, but that the Commission's recommendation in regard thereto (limited to the power features) had been based on the now invalid assumption that the power supply of Tacoma and the area was adequate (R. II 527-528) and further that the project was not inconsistent with the Plan in that both contemplated extensive expenditures for fish hatcheries and related facilities (R. II 533). Finally, after discussing the project's effect upon fish life and the various problems still to be solved in regard thereto, the Commission concluded (R. II 536-537):

> * * * Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.
>
> We are required to consider all of the possible advantages and disadvantages of the City's

> proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values.
> * * *

Following the Commission's denial of their petition for rehearing (R. II 460-522, 579-582),[10] petitioners sought review in the court below, which affirmed the Commission's order (R. II 686-698; X 4397-4413). The court held that this Court's decision in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, was dispositive of petitioners' contention that unless Tacoma complied with the State laws the Commission had no authority to issue a license (R. X 4405-4408). It further ruled that

[10] In its opinion denying rehearing, the Commission made it clear that when the plans for fishery facilities were submitted for approval the Washington State conservation agencies would be consulted and be given every opportunity to furnish any evidence material and relevant to these plans (R. II 581-582).

the Commission's findings as to the necessity of the project to alleviate the power shortage, as to the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, and as to the Cowlitz Project being best adapted to a comprehensive plan for developing the River, were supported by substantial evidence, not an abuse of discretion, and conclusive (R. X 4409-4412). It, accordingly, concluded that there was "ample evidence to sustain the Commission in the exercise of its judgment that the Cowlitz Project is 'best adapted to a comprehensive plan for improving or developing a waterway [*i.e.*, the Cowlitz River] * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes' " (R. X 4412-4413).

ARGUMENT

In this Court, petitioners do not contend that the Commission was without jurisdiction to authorize the construction of hydroelectric projects on the Cowlitz River. See *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152, 163. Rather, they appear to rely on the same grounds which they urged without success upon the Commission and the court below. The Court of Appeals correctly rejected these contentions and held properly instead that the Commission's order granting the license was supported by substantial evidence and was in accordance with the applicable decisions of this Court. Accordingly, there is no warrant for review by this Court.

1. As the court below held (R. X 4405-4408), this Court's decision in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, is dispositive of petitioner's claim that the Washington statutes limiting the construction of hydroelectric projects on the Cowlitz River operate to restrict the Commission's licensing authority under the Federal Power Act. See, also *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 404, 405, 426-427. In *First Iowa,* as here, there was a direct conflict between the project authorized by the Commission and the statutes of the State involved, in that Iowa law undertook to prohibit the type of development licensed by the Commission. This Court, in rejecting Iowa's contention that the State law operated as a limitation upon the Commission's licensing authority, expressly held that nothing in the Federal Power Act required compliance with a conflicting local law as a condition precedent to the issuance of a federal license. See 328 U.S. at 162 *et seq.* For example, the Court stated (328 U.S. at 162, 164, 181):

> * * * The Commission would have been justified in following its own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.
>
> * * * * *

> To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.
>
> * * * * *
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *

Petitioners urge that *First Iowa* is distinguishable principally on the ground that the Washington statutes relate "to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses" which, *First Iowa* recognized, were saved by Section 27 of the Power Act (Pet. p. 29; Appendix A, *infra,* p. 23).[11] This dis-

[11] Petitioners also claim that the fact that the Washington statutes are directed at protecting fish life further distinguishes *First Iowa* and renders it inapplicable. It is settled, however, that the authority of the States to protect fish life in navigable waters, like all other aspects of State authority in regard to these waters, is subordinate to the Federal Government's paramount right of navigation. See, *e.g., McCready* v. *Virginia,* 94 U.S. 391, 394-395; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. 82,

tinction, however, has no substance since there can be no doubt that the Washington statutes were concerned solely with regulatory controls over the waters of the Cowlitz River. Not only were the Iowa laws which were held superseded in *First Iowa* of a similar regulatory nature, but this Court in *First Iowa* plainly read Section 27 as only saving state laws relating to certain types of proprietary rights (328 U.S. at 175-176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be in the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.

Moreover, contrary to petitioners' contention (Pet. 17, 32-34), there is no conflict as to the scope of Section 27 between the holding below and *Niagara Mohawk Power Corporation* v. *Federal Power Commission,* 202 F. 2d 190 (C.A. D.C.), pending on writ of certiorari, No. 28, this Term. The rights under State law sought to be asserted in *Niagara Mohawk* do not relate to regulation of the use of the waters of the Niagara River, as is the case here, but rather were certain usufructary rights allegedly valid under State law to generate power with these waters. And while the Court of Appeals ruled that such rights are saved from supersedure by Section 27, it expressly recognized (202 F. 2d at 207):

> [W]hen state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case.[12]

Plainly, therefore, far from being in conflict, the decision below is fully consistent with *Niagara Mohawk.*[13]

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[12] While the Commission accepts this reading of Section 27, it goes further and takes the position that the alleged usufructary rights there involved are likewise outside the scope of Section 27. See Brief for Federal Power Commission in No. 28, this Term.

[13] *Ford and Son* v. *Little Falls Fibre Co.*, 280 U.S. 369; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359 and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, cited by petitioners (Pet. pp. 25-26), have no bearing here if only for the reason that they all involve proprietary rights. In addition, it is to be noted that in *Grand River*, this Court expressly

2. There is ample support for the Commission's conclusion that the project is best adapted to a comprehensive plan of development of the Columbia River system. Petitioners attempt to give their attack on this finding a semblance of validity by focusing upon the potential loss of fishery resources. But apart from the facts that the loss will probably not be nearly so extensive as urged by petitioners and that the Commission was anxious that the loss be minimized and directed that the best possible facilities for achieving that goal be devised,[14] it is important to remember that fishery resources were not the sole element considered by the Commission in arriving at its conclusion. On the contrary, it is only one of the several factors weighed by the Commission in arriving at its conclusion in a complex and difficult situation. As pointed out *supra,* pp. 6-10, the Commission found that the

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refrained from passing on the scope of Section 27 (335 U.S. at 373-375) and further that *Gerlach* involved the saving of state rights under the Reclamation Acts, not the Federal Power Act.

Also the decision of this Court in *Morris* v. *Jones,* 329 U.S. 545, holding that where, as here, the state and federal statutes cannot be reconciled or consistently stand together, the action of a state even under its police power must give way, clearly disposes of the petitioners' contentions to the contrary (Pet. 24-25, 27).

[14] The Commission has gone to exceptional lengths to see that the fisheries resources of the Cowlitz are protected to the fullest extent possible, requiring an initial investment of $9,400,000 and annual expenditures of around $610,000 for this purpose together with close cooperation between the City of Tacoma and the State and Federal fishery agencies (R. II 550-559). The State agency has already been in correspondence with the City and Commission in furtherance of this objective, and has been and will be afforded every opportunity to assist in protecting these important fishery resources.

project would furnish substantial flood control, navigation and recreation benefits. It also found that the project would be an exceptionally valuable addition to the Northwest Region power supply and would assist greatly in alleviating the power shortage in the area, and further that even if no fish life above the Mayfield site were saved, the power benefits alone would more than offset the resulting fishery loss. It was only after balancing these benefits against the possible fish loss that the Commission concluded that the license should issue.

Petitioners again contend (Pet. 19-23) that the Commission's findings that the Cowlitz project is best adapted to a comprehensive plan of development is contrary to the comprehensive plan of the lower Columbia River basin and the Columbia River Fishery Plan. The Commission gave full consideration in its opinion and order to this contention (R. II 527-529, 547-548), and set forth fully the reasons why, in its judgment, it was in the public interest to grant the license.

Congress has never approved or adopted the overall plan although it has appropriated money for particular facilities included therein (R. II 527, 547-548) and in the absence of such adoption or approval, there is no statutory restriction upon the Commission's jurisdiction. Cf. *Chapman* v. *Federal Power Commission,* 345 U. S. 153. Moreover, although the Commission and the Army Engineers may have approved the Plan in 1948, the Commission at least limited its approval to the power fea-

tures, and both the Commission and the Engineers predicated their recommendation on the assumption that the power supply was otherwise adequate (R. I 408; II 527-529). Inasmuch as the situation has now changed and the existing power facilities are inadequate to satisfy the demand, there is no reason why the 1948 Plan should be binding upon the Commission, particularly since the Plan itself is still being revised and must of necessity be kept flexible in order to meet changing conditions. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787, 792 (C. A. 2), certiorari denied, 320 U. S. 792.

In these circumstances, there is no basis for upsetting the Commission's conclusion, particularly since the resolution of these conflicting factors is committed to the expert judgment of the Federal Power Commission by Section 10(a) of the Power Act (App. A, *infra,* pp. 21-22). As stated in *Chapman* v. *Federal Power Commission,* 345 U. S. 153, where this Court affirmed the Commission's grant of a license for a project on the Roanoke River (345 U. S. at 171):

> Subordinate arguments are made, bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power

> to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason.

See, also, *Montana Power Company* v. *Federal Power Commission,* 112 F. 2d 371, 374 (C. A. 9); *State of Iowa* v. *Federal Power Commission,* 178 F. 2d 421, 427 (C. A. 8), certiorari denied, 339 U. S. 979; cf. *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 231; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 597.

CONCLUSION

The order of the Commission, affirmed by the court below, is supported by adequate evidence and is in accordance with law. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1954.

APPENDIX A

The Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) provides in pertinent part:

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such

as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 23 * * *

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which

Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

APPENDIX B

1. The Columbia River Fish Sanctuary Act (Chapter 9, State of Washington Laws of 1949,

Revised Code of Washington 75.20.010) provides in pertinent part:

> SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided,* That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game.

2. The Washington Fisheries Code (Chapter 112, State of Washington Laws of 1949, Revised Code of Washington 75.20.050, 75.20.100) provides in pertinent part:

SEC. 46. It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

* * * * *

SECTION 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or

government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fish life in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction of any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications.

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